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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

V.

AMERICAN AUTOMATIC SPRINKER SYSTEMS, INC.

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

WILLIAM W. OSBORNE, JR.,
(Counsel of Record)
MARGUERITE GRAF
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD,
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

3698

QUESTIONS PRESENTED

1. On the strength of this Court's decision in Local 1424 v. NLRB (Bryan Manufacturing), 362 U.S. 411 (1960) construing National Labor Relations Act §10(b), the National Labor Relations Board has adopted a preclusive rule against delayed attacks on continuing collective bargaining systems through the raising of an untimely defense that the initial NLRA §9(a) recognition agreement was invalid.

The first question presented here -- as to which there is a conflict between the Tenth and Eleventh Circuits and the Fourth Circuit -- is whether this rule of preclusion is valid in the construction industry context.

2. Whether the Fourth Circuit erred in determining for itself in the first instance that a §9(a) recognition agreement is invalid on the ground that, in the Court of Appeal's judgment, the union's proffer to the employer showing majority support was an inadequate showing in that regard.

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PETITION FOR A WRIT OF CERTIORARI

Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit in American Automatic Sprinkler Systems v. NLRB, 4th Circuit Nos. 97-1821 and 97-2014.

OPINIONS BELOW

The decision of the court of appeals is reported at 163 F.3d 209 (4th Cir. 1998) and is reproduced in the separately bound appendix to this certiorari petition ("Pet. App.") at pp. 1a - 29a. The court of appeals order denying rehearing and rehearing en banc is unreported and is reproduced at Pet. App. pp. 182a-183a. The underlying decision and order of the National Labor Relations Board is reported at 323 NLRB 920 (1997) and is reproduced at Pet. App. pp. 30a-181a.

JURISDICTION

The decision of the court of appeals issued on December 17, 1998. That court's order denying timely petitions for rehearing and suggestions for rehearing en banc issued on March 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 8(a)(2), 8(a)(5), 8(f), 9(a) and 10(b) of the National Labor Relations Act, as amended, 29 U.S.C.§§ 158(a)(2), (5)and (f), 159(a), and 160(b), insofar as pertinent to this case are set out at Pet. App. pp. 190a-192a.

STATEMENT OF THE CASE

By reason of the Court of Appeals' legal theory here -- and contrary to the time limitations provision of the National Labor Relations Act as well as the general principles designed to assure fair and orderly litigation -- the pertinent events are *not* those that took place in 1994 and that precipitated the timely NLRA §8(a)(5) unfair labor practice charge in this case but rather the events that took place in October *1987*, that *never* precipitated any unfair labor practice charge and that, by reason of the NLRA's six month limitations period, were, as of April, 1988, events that could *never* preoccupied a timely charge or a valid NLRB complaint.[1] Given the resulting posture of the case, we first outline the rulings that brought matters to this pass; we then set out the facts regarding the 1987 events on which, according to the court below, this case pivots; and we conclude by tracing the course of this litigation from the charge to the decision below.

1. In the context of a twenty year history of collective bargaining and during negotiations in 1994 for a new agreement, American Automatic Sprinkler Systems, Inc. ("American Automatic" or "the Employer") -- after only three brief bargaining sessions -- announced that its negotiations with Road Sprinkler Fitters Local 669, U.A., AFL-CIO ("Local 669" or "the Union") were at an end, rejected the Union's requests for further bargaining, and unilaterally instituted substantial changes in terms and conditions of employment. Pet. App. 6A-7A.

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[1]NLRA § 10(b) provides, in material part, that "[n]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to filing of the charge with the Board..."

Local 669 filed unfair labor practice charges against the Employer with the National Labor Relations Board ("NLRB" or "the Board") and, insofar as relevant here, alleged that American Automatic had implemented unilateral changes in wages and working conditions in violation of NLRA §8(a)(5) without first bargaining in good faith to an impasse.[2] Pet. App. 7a-8a.

After investigation, the NLRB General Counsel issued a §8(a)(5) refusal to bargain in good faith complaint. After a full trial on that complaint, an NLRB Administrative Law Judge found that American Automatic had indeed refused to bargain in good faith in 1994 in violation of NLRA §8(a)(5). And, on exceptions and briefs from that ALJ decision, the NLRB affirmed the ALJ's conclusions. Pet. App. 30a-48a.

American Automatic then petitioned for review in the United States Courts of Appeals for the Fourth Circuit, the NLRB cross petitioned for enforcement and Local 669 intervened. The Court of Appeals denied enforcement to the Board's §8(a)(5) refusal to bargain order. Pet. App. 19a-28a.

In this regard, the Court of Appeals ruled that this refusal to bargain case turns *not* on what American Automatic did in 1994 in the course of its collective bargaining with Local 669, but rather on what had transpired in 1987 (seven years

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[2]After refusing to bargain, American Automatic also unlawfully constructively discharged Local 669 members and unlawfully refused to employ other Local 669 members, and bypassed the Union to deal directly with unit employees. Local 669 filed NLRA §§ 8(a)(3)and (5) charges regarding these unfair labor practices. Companion unfair labor practice charges were also filed by U.A. Local 536, a sister local union of Local 669, and the two cases were thereafter consolidated and jointly adjudicated before the NLRB and the Court of Appeals.

before the instant NLRB charge was filed) when American Automatic voluntarily signed an agreement -- that had been tendered by Local 669 together with a showing of majority support -- recognizing the Union's status as the NLRA §9(a) majority representative of the Employer's sprinkler fitters employees.[3] Pet. App. 19a-28a.

According to the Court of Appeals, American Automatic's 1987 voluntary §9(a) recognition agreement with the Union was of no effect because the Union had not properly demonstrated its majority status to the Employer at that time; that being so, the Employer had never been subject to an NLRA §8(a)(5) obligation to bargain with the Union; and, that being so, the Employer's refusal to bargain in good faith in the 1994 negotiations was not an unfair labor practice at all but, to the contrary, conduct outside the NLRA's ambit and thus of no concern to the law. Pet. App. 19a-28a.

The Court of Appeals ruled as it did even though the Employer would have committed an NLRA §8(a)(2) unfair labor practice in 1987 by recognizing a nonmajority union as an NLRA §9(a) majority representative of its employees; even though NLRA §10(b) sets a strict six month limitations period for filing unfair labor practice charges, including charges that an employer has recognized a minority union as a §9(a) majority representative; even though no such charge regarding American Automatic's 1987 recognition of Local 669 was ever filed, much less timely filed; and even though the rule, derived

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[3]NLRA § 9(a) provides, in material part, that "(r)epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining..."

from this Court's decision in Local Lodge 1424 v. NLRB (Bryan Manufacturing), 362 U.S. 411 (1960), is that § 10(b) prohibits the resurrection of legally defunct unfair labor practices to attack the lawfulness of a union's recognition as a §9(a) majority representative -- whether directly through the filing of an untimely unfair labor practice charge or indirectly through raising an untimely defense.[4]

2. Against this legal background set by the Court of Appeals, we turn next to the sequence of events in 1987.

Early in that year, the NLRB issued its seminal decision restating and revising its rules on construction industry bargaining relationships in John Deklewa & Sons, 282 NLRB 1375 (1987), enf'd sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3rd Cir.), cert. denied 488 U.S. 889 (1988). In essence, and insofar as pertinent here, Deklewa holds first that NLRA §8(f) agreements with nonmajority unions in the construction industry are enforceable during their term but do not give rise to a continuing NLRA §8(a)(5) duty to bargain at their expiration; and, second, that, in the construction industry as an all other industries, NLRA §§9(a) and 8(a)(5), which set the legal rules for the voluntary recognition of majority unions, continue to apply so that "the normal presumptions... flow from voluntary recognition accorded to a union by the employer of a stable workforce where that recognition is based on a clear showing a majority support among unit employees..." 282

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[4]NLRA § 8(a)(2) makes it an unfair labor practice to "dominate or interfere with" the establishment of a union and prohibits granting § 9(a) recognition to a union that does not enjoy majority support among bargaining unit employees. Garment Workers v. NLRB, 366 U.S. 731, 737 (1961).

NLRB at 1387, n.53.[5]

In response to the Deklewa decision, Local 669 requested that American Automatic, along with other employers with whom the Union had collective bargaining relationships, execute a separate written acknowledgment of the Union's status as the §9(a) bargaining representative of its employees in an appropriate bargaining unit. The Union explained that it was seeking to formalize its status as the employees' §9(a) bargaining representative, in the clearest possible terms, in the aftermath of the Deklewa decision and to remove any doubt that the Union was indeed a §9(a) majority representative and not merely a party to a §8(f) agreement in the construction industry. Pet. App. 4a-5a. See also Court of Appeals Joint Appendix at 196 (October 12, 1987 letter from Local 669 to American Automatic in full text).

The §9(a) recognition agreement proposed by Local 669 to American Automatic provided:

> [American Automatic]... has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by ... Local 669 ... for purposes of collective bargaining. [American Automatic] therefore unconditionally acknowledges and confirms that Local 669 is the exclusive

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[5]Section 8(f) provides, in material part, that it "shall not be an unfair labor practice... for an employer engaged primarily in the building and construction industry to make an agreement... with a labor organization... because (1) the majority status of such labor organization has not been established under the provisions of [Section 9 of the Act]... prior to the making of such agreement..."

> bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act. [Pet. App. 4a].

Local 669 submitted to American Automatic, together with its recognition request, documentation that the Employer's bargaining unit employees were *all* members of the Union. And, Local 669 advised the Employer that, if it was not willing to voluntarily stipulate to the Union's §9(a) majority representative status, the Union would proceed to have its §9(a) majority status determined through an NLRB representational election.

American Automatic signed and returned the Local §9(a) recognition agreement, promptly and without objection or comment. The Employer, moreover, subsequently bargained successor collective bargaining agreements with the Union in 1988 and again in 1991. The 1988 and 1991 agreements each likewise recited Local 669's status as "the exclusive bargaining representative of [American Automatic] sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act." Pet. App. 4a-5a.

3. Nonetheless, in response to Local 669's refusal to bargain in good faith charge in relation to the parties' 1994 negotiations, American Automatic asserted for the first time (i) that the most recent and now expired 1991-94 collective bargaining agreement was merely a §8(f) agreement; and (ii) that -- notwithstanding the parties' twenty year bargaining history and the contrary terms of the Employer's express, written, 1987 §9(a) recognition agreement with the Union -- Local 669 had *never* in fact attained the status of a §9(a) majority bargaining representative of American Automatic's sprinkler fitter employees.

The NLRB summarily rejected American Automatic's attempt to retrospectively nullify its previous recognition of the Union's §9(a) majority representative status as "untimely raised." Pet. App. 33a, 84a-85a.

On review, as we noted at the outset, the Court of Appeals held that American Automatic's 1994 refusal to bargain *could not* have violated NLRA §8(a)(5) because, notwithstanding parties' 1987 §9(a) recognition agreement, at *no time* during the parties' twenty year relationship was the Employer ever "under a [§§9(a) /8(a)(5)] legal obligation to bargain collectively" with the Union. Pet. App. 19a-25a, 28a.

The Court of Appeals rejected the NLRB's ruling that seven years after the fact the Employer was barred from challenging the validity of the 1987 §9(a) recognition agreement and of the Union's status as a majority representative at that time:

> Recent decisions of the Board and of the Tenth and Eleventh Circuits to the contrary notwithstanding, we do not believe that Section 10(b) can reasonably be interpreted to prohibit [the Employer], the party against whom the complaint has been filed, from defending itself by challenging the validity of the evidence of effective recognition that is the basis of the *Board's* Complaint. [Pet App. 21a., emphasis in original]

The court below noted that NLRA §10(b), by its terms, governs *"complaints* filed by the Board" and that even if "*arguendo*" it could be said that §10(b) imposes time limitations upon an untimely challenge the validity of a

recognition of a union as a §9(a) majority bargaining representative as a *defense* to an NLRB complaint in non-construction industry cases, §10(b) can not have such an application in the construction industry because NLRA §8(f) "establishes the legality of such [nonmajority §9(a)] relationships" in the construction industry. Pet. App. 19a-21a.

The Court of Appeals then proceeded to investigate the record evidence and decide for itself the validity of the Employer's 1987 §9(a) recognition agreement, and found the agreement retroactively null and void. According to that court, the asserted existence of a union security clause in the collective bargaining agreement in effect in 1987 in and of itself rendered the undisputed fact of union *membership* of the unit employees at the time of union recognition an insufficient indicator of their desire for union *representation* to support recognition of the Union as a §9(a) majority representative. Pet. App. 22a-24a.

REASONS FOR GRANTING THE WRIT

I. The Scope of the Bryan Manufacturing Preclusion Rule

The Fourth Circuit's decision here is in the teeth of all of the following:

- Congress' policy, embodied in NLRA §10(b), of "protect[ing] continuing collective bargaining systems from delayed attack," United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 68 (1981) (Stewart J. concurring);

- This Court's teachings on §10(b) in Local Lodge No. 1424 v. NLRB, (Bryan Manufacturing), 362 U.S. 411 (1960);

- The NLRB's uniform post-Bryan Manufacturing line of decisions holding that §10(b) principles bar "delayed [counter] attacks" on continuing collective bargaining systems through the untimely interposition of the defense that the bargaining relationship was invalid at its inception, as well as "delayed attacks" on such systems through the filing of untimely charges alleging such an initial invalidity;[6]

- The decisions of the Third, Fifth, Sixth, and Ninth Circuits endorsing the Board's application of §10(b) principles to bar delayed attacks on continuing non-construction industry collective bargaining systems through the interposition of an

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[6]E.g. Brower's Moving & Storage, 297 NLRB 207, 209 n.11 (1989), enf'd 914 F.2d 239 (2d Cir. 1990), cert. denied 499 U.S. 905 (1991); Mr. Clean of Nevada, 288 NLRB 895, 907 (1988); Morse Shoe, 227 NLRB 391, 394 (1976); North Bros. Ford, Inc., 220 NLRB 1021 (1975)(citing cases.)

untimely defense;[7] and

• The decisions of the Tenth Circuit in MFP Fire Protection v. NLRB, 101 F.3d 1341 (10th Cir. 1996), and the Eleventh Circuit in NLRB v. Triple A Fire Protection, 136 F.3d 727 (11th Cir. 1998), cert. denied 119 S.Ct. 795 (1999) -- cases that are all but legally and factually *identical* to the instant case -- ratifying the application of the same § 10(b) principles by the Board to bar such attacks in the *construction industry*.[8] The decision below is, indeed, in *direct and irreconcilable* conflict with the Tench Circuit's MFP Fire Protection decision and the Eleventh Circuit's Triple A Fire Protection decision.[9]

"The 6 month bar of §10(b) was enacted to strengthen and defend the 'stability of bargaining relationships.'" United Parcel Service, Inc., 451 U.S. at 68 (Stewart, J. concurring) (citing Bryan Manufacturing, supra)(footnote omitted). Section 10(b) does so by precluding delayed challenges to the validity

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[7]Pick-Mt. Laurel Corp. v. NLRB, 625 F.2d 476, 483 (3d Cir. 1980); Daisy's Originals of Miami, Inc. v. NLRB, 468 F.2d 493, 501 (5th Cir. 1972); NLRB v. Dist. 30, UMW, 422 F.2d 115, 120 (6th Cir. 1969), cert. denied 393 U.S. 959 (1970); NLRB v. Traignew, Inc., 470 F.2d 669, 673 (9th Cir. 1972). See also NLRB v. Brower's Moving & Storage, 914 F.2d 239 (2d Cir. 1990), affirming without opinion 297 NLRB 207, 209 n.11 (1989).

[8]See also NLRB v. Goodless Elec. Co., Inc., 124 F.3d 322, 329-31 (1st Cir. 1997)(dicta).

[9]The Tenth Circuit's decision in MFP Fire Protection followed its earlier decision in NLRB v. Viola Industries-Elevator Div., Inc., 979 F.2d 1384 (1992), holding that a construction industry employer's eleven month after the fact claim that the employer had been "coerced" into signing a §8(f) prehire agreement was precluded by the §10(b) time limitation which "has been interpreted to apply to affirmative defenses such as coercion." Id. at 1387 (citations omitted).

of an employer's recognition of a union as a §9(a) majority bargaining representative that would require "litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the event in question have become dim and confused'," Bryan Manufacturing, 362 U.S. at 419 (quoting H.R. Rep. No. 248 80th Cong. 1st Sess., p.40). And, with full recognition of the competing interests that would justify permitting delayed challenges to an employer's recognition of a union as a §9(a) majority bargaining representative and the concomitant of a legally protected bargaining relationship, Congress chose to preclude such challenges on the judgement that the paramount interest in this instance is "'industrial peace which it is the over-all purpose of the Act to secure'." Bryan Manufacturing, 362 U.S. at 428.

The conflict in the circuits generated by the decision below on whether §10(b) precludes delayed *counter* attacks on the validity of the construction industry collective bargaining systems -- and the disuniformity in the law it entails -- in itself undermines Congress' regime for achieving industrial peace.

It is plainer yet that the Fourth Circuit's ruling is antithetical to the system Congress provided for administering the national labor policy in a manner that furthers industrial peace and stability:

- Whereas Congress took extraordinary precaution against "litigation over past events," the Fourth Circuit's decision here encourages such litigation and the labor management instability -- and unfair and unjust results -- that such litigation generates.

- And, whereas Congress took those precautions to preclude delayed assaults on ongoing collective bargaining

systems, the Fourth Circuit decision provides construction employers -- such as the Employer here whom the court below recognized as "anti-union" and bent on "rid[ding] its workforce of active union members" -- with an incentive to bargain in bad faith with a union that the employer knows is a current majority representative and to play the odds that the union can not, as a condition of securing NLRB relief against that plain current wrong, prove the validity of its original recognition many years or even decades before and "after records have been destroyed, witnesses have gone elsewhere and recollection of the event in question have become dim and confused."

In sum, the decision below generates a conflict in the circuits on a recurring questions of great moment to the proper administration of the National Labor Relations Act and does so through a ruling that defies Congress' judgement that delayed attacks on continuing collective bargaining systems are inimicable to the proper effectuation of the national labor policy and should, on that ground, be barred. That being so, this is a case that calls for this Court's review.

1. Bryan Manufacturing held that an NLRA §8(a)(2) charge challenging the recognition of a minority union as a §9(a) majority representative and the signing of a collective bargaining agreement containing a union security clause, filed fifteen months after that recognition and the consummation of that agreement, is barred by The NLRA §10(b) six month limitations period. The Court emphasized that to further "the interest in industrial peace," Congress "barred the Board from dealing with past conduct after the [§10(b) six month] period had run even at the expense of the vindication of statutory rights." 362 U.S. at 428-29.

The NLRB was thereafter called on to apply the Court's

Bryan Manufacturing teaching where the belated challenge to the validity of an NLRA §9(a) recognition and the initiation of a collective bargaining relationship governed by §8(a)(5) took the form of an untimely *defense* rather than the form of an untimely charge. In Hod Carriers Local 1298 (Roman Stone Construction Co.), 153 NLRB 659, n.3 (1965), the Board ruled that the Bryan Manufacturing preclusion rule applies to both situations. Thus, a construction industry union could not raise a belated challenge to a rival union's voluntary recognition and majority status *as a defense* to an allegation of unlawful recognitional picketing in violation of §8(b)(7)(A).

By the same token, the Bryan Manufacturing rule bars untimely counter attacks on continuing collective bargaining systems made as a defense by employers charged with an NLRA §8(a)(5) refusal to bargain in good faith:

> ...(T)he Board has refused to allow unions charged with unlawful picketing to invoke as a defense the invalidity of the incumbent union's initial recognition, in circumstances where Section 10(b) would have precluded a direct challenge to the legality of such recognition in unfair labor practice proceeding ... We perceive no valid reason in principle why a greater privilege should be given an employer... [Barrington Plaza and Traigniew, Inc., 185 NLRB 962, 964 (1970), enf'ment denied on other grounds sub. nom NLRB v. Traigniew, 470 F.2d 669 (9th Cir. 1972).]

The NLRB's reading of Bryan Manufacturing as the predicate for a bar to raising delayed challenges to the validity of an initial §9(a) recognition as a defense has been endorsed

by the Third, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits, in essence for the reasons stated by the Sixth Circuit:

> [The Respondent Unions] attempt to avoid the holding in [*Bryan Manufacturing*] by pointing out that it was not [the Unions] who filed the complaint [and] that [the Unions] merely sought to shed light on the true character of matters occurring within the [Section 10(b)] limitations period...
>
> Both of these contentions are without merit. The Supreme Court announced a rule in [*Bryan Manufacturing*] which prevents the resurrection of legally defunct unfair labor practices in the guise of evidence and the resultant subversion of the policies promoted by the limitations period of Section 10(b). To permit [the Unions] to invoke the company's putative unfair labor practices as a defense to the unlawful picketing charge would be directly contrary to this rule. [NLRB v. Dist. 30, UMW, 422 F.2d 115, 121-22 (6th Cir. 1969).][10]

2. Building on these precedents, the Board has ruled that the Bryan Manufacturing preclusive rule against delayed attacks on continuing collective bargaining systems applies in the construction industry as well as in nonconstruction industries covered by the NLRA:

> In non-construction industries, if an employer grants Section 9 recognition to a union and

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[10]See cases cited at fn.7, supra.

more than 6 months elapse, the Board will not entertain a claim that majority status was lacking at the time of recognition. A contrary rule would mean that longstanding relationships would be vulnerable to attack, and stability in labor relations would be undermined.

These same principles would be applicable in the construction industry. In *Deklewa*, the Board said that unions in the construction industry should not be treated less favorably than those in nonconstruction industries. As shown above, parties in nonconstruction industries, who have established and maintained a stable Section 9 relationship, are entitled to protection against a tardy attempt to disrupt their relationship. Parties in the construction industry are entitled to no less protection. Accordingly, if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition. [Casale Industries, 311 NLRB 951, 953 (1993)(citing Bryan Manufacturing, supra).][11]

In two recent decisions, the Tenth Circuit and the Eleventh Circuit have endorsed the Board's recognition that the

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[11]See also Decorative Floors, Inc., 315 NLRB 188, 188-89 (1994); Hayman Electric, 314 NLRB 879, n.2 (1994); Excel Fire Protection, 308 NLRB 241, 243 (1992). See Deklewa, 282 NLRB at 1387, n.53; McLean County Roofing, 290 NLRB 685, 686 n.4 (1988).

Bryan Manufacturing preclusion rule applies to construction industry employer counterattacks on continuing collective bargaining systems through an untimely defense to a timely refusal to bargain in good faith charge. As the Eleventh Circuit put its conclusion,

> In this case, the Board held that its decision in Deklewa has established that unions in the construction industry which had achieved full Section 9(a) recognition should not have less favored status then unions outside the construction industry... [and] that the six-month limitations period of Section 10(b) was applicable and that a challenge to a union's majority status could not be entertained after a lapse of more than six months. We hold that the Board's interpretations is reasonable ... [and that] Local 669 thus enjoyed Section 9(a) status, just as any other union outside the construction industry. [Triple A Fire Protection, supra, 136 f.3d at 737.]

It is very much to the point that MFP Fire Protection and Triple A Fire Protection arose on *precisely* the same facts as the instant case. All three decisions involve employers in the fire protection sector of the construction industry that (i) voluntarily executed the *identical* October 1987 §9(a) recognition agreements with Local 669; and (ii) then sought to retrospectively repudiate that same recognition agreement some years later as a defense to an NLRA §8(a)(5) refusal to bargain in good faith complaint. Indeed, the three cases are, as the Board recognized, "materially identical... and controlled by" the same legal principles. MFP Fire Protection, 318 NLRB at 842.

3. All this notwithstanding -- and, in the Fourth Circuit's words, "recent decisions of the Board and of the Tenth and Eleventh Circuit to the contrary notwithstanding," -- the court below held that the Board's Bryan Manufacturing rule precluding untimely "employer defenses of invalid voluntary recognition" to timely refusal to bargain in good faith charges is an invalid rule "in the construction industry context." Pet. App. 19a-21a.

In creating this conflict in the circuits, the Fourth Circuit did not deny that its ruling sanctions exactly what the Bryan Manufacturing rule is intended to preclude: "delayed attack[s]" on "continuing collective bargaining systems" that undermine both the "stability of bargaining relationships," United Parcel Service, Inc., 451 U.S. at 68 (Stewart, J. concurring), and the "industrial peace which it is the over-all purpose of the Act to secure," Bryan Manufacturing, 362 U.S. at 428; or that its ruling does so by precipitating "litigation over past events after records have been destroyed, witnesses have gone elsewhere and recollections of the events in question have become dim and confused," id. at 419 (internal quotation marks omitted). Nor did the Fourth Circuit point to anything so much as suggesting that the interests furthered by the Bryan Manufacturing rule are interests that do not apply in the "construction industry context" in the same way and with the same force as in all other NLRA contexts.

To be sure, the court below did advert to the interest in "employee free choice" as the interest furthered by, and justifying, its ruling. Pet. App. 24a. But that was the interest invoked by the respondents in Bryan Manufacturing in arguing for a "continuing violation" theory that would permit delayed attacks on the validity of §9(a) majority bargaining

representative recognitions. And, it is the interest this Court concluded is outweighed by the interests in industrial stability and industrial peace furthered by the §10(b) preclusion rule the Court adopted there -- and the Fourth Circuit here rejected in the construction industry.

It is also to the point that in cases like this one -- in which no employee has ever raised any objection to union representation and in which an employer, who has refused to bargain in good faith and who has done so as part of an overall anti-union campaign of discriminatory discharges of union members and of discriminatory refusals to hire, raises the defense that, deep in the past, the employer improperly recognized a minority union as a §9(a) majority bargaining representative "to allow [the] employer[ ] to rely on employees' rights in refusing to bargain with the... designated union is not conducive to [industrial peace], it is inimical to it," Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 790 (1996)(citing Brooks v. NLRB, 348 U.S. 96, 103 (1954)(Bracketed material in original).

On analysis, then, the entire base for Fourth Circuit's decision here is this:

> As one Board member recognized in Triple A Fire Protection, Inc., 312 NLRB 1088, 1089 n.3 (1993), "the basis for applying a 10(b) limitations period in the nonconstruction industry workplace, where minority recognition is unlawful, does not hold in the construction industry, where there is no statutory prohibition on minority recognition." Id, at 1089 n.3. Thus, in the construction industries, a *defense* of valid voluntary recognition is tantamount to

> a *charge* of unlawful conduct under the NLRA provisions prohibiting employers and nonmajority unions from entering into collective-bargaining agreements. This is not the case in the construction industry, where 8(f) itself establishes the legality of such relationships. [Pet.App. 20a-21a (emphasis in original)].

That base is too insubstantial to support a feather. Very simply stated it is made up of a plain and complete misunderstanding of the substantive NLRA law governing §8(f) agreements in the construction industry, §9(a) bargaining relationship in that industry, and the interrelation between the two.

As this Court has observed, NLRA §8(f) "allows construction industry employers and unions *to enter into agreements* setting the terms and conditions of employment for the workers hired by the signatory employers without the union's majority status first having been established in the manner provided for in §9 of the Act." McNeff, Inc. v. Todd, 461 U.S. 260, 266 (1983) (emphasis supplied). Thus, §8(f) does *not* license minority §9(a) *recognition* in the construction industry. To the contrary, §8(f) has a far more modest office -- it is "[t]he *execution of an agreement* with a minority union, an act normally an unfair practice by both employer and union, [that] is legitimated by §8(f) when the employer is in the construction industry." NLRB v. Local 103 Iron Workers (Higdon Const. Co.), 434 U.S. 335, 345 (1978) (emphasis supplied).

None of this has anything to do with the requisites for a valid construction industry employer recognition of a

construction industry union as the §9(a) majority bargaining representative of a group of employees in an approperate bargaining unit or of the law governing the recognition of a minority construction industry union as a §9(a) representative.

Since long before the Board's 1987 Deklewa decision it has been settled law that employer recognition of a union as an NLRA §9(a) exclusive bargaining representative in the construction industry is governed by the same principles that govern in all other NLRA industries, and that a valid construction industry recognition agreement has the same force and effect and establishes the same continuing rights and obligations as such an agreement in any other industry. Deklewa, 282 NLRB at 1387, n.53; Decorative Floors, Inc., 315 NLRB 188, 189 (1994); Hayman Electric System, 314 NLRB 879, 887 n.8 (1994); Golden West Electric, 307 NLRB 1494, 1495 (1992); Great Southern Construction, Inc., 266 NLRB 364, 365 (1983). See generally, e.g., NLRB v. Gissell Packing Co. Inc., 395 U.S. 575, 596-99 (1996).[12]

Equally to the point, the NLRA §8(a)(2) prohibition against extending voluntary §9(a) recognition in the construction industry where the requirements of §9(a) are not satisfied is likewise well established by longstanding NLRB caselaw. [13]

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[12]Voluntary §9(a) majority recognition in the construction industry dates back to at least the early 1960's. E.g., Island Construction Co., Inc., 135 NLRB 13, 15-16 (1962).

[13]The application of NLRA §8(a)(2) to prohibit invalid §9(a) *recognitions* in the construction industry is commonplace in NLRB decisions such as where an employer has been found to have improperly assisted the union in obtaining majority support among unit employees or coerced employees into joining the union, or where a previous union

Nothing in §8(f) effects either of these settled rules of long standing. Section 8(b) agreements and §9(a) recognition agreements are entirely separate distinct and the law governing each class of agreements is entirely separate and distinct.

The sum of the matter is this: on every count the Tenth Circuit's MFP Fire Protection decision and the Eleventh Circuit's Triple A Fire Protection decision applying the Bryan Manufacturing rule to the construction industry are correct, and the Fourth Circuit's contrary decision here is wrong.

II. The Validity of the §9(a) Recognition Agreement

The Fourth Circuit's substantive ruling that the 1987 American Automatic/Local 669 §9(a) recognition agreement was null and void at its inception and that the parties here had no collective bargaining relationship governed by §§9(a) and 8(a)(5) is as wrong as its Bryan Manufacturing ruling and as harmful to industrial peace and stability.

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was awfully recognized or where a rival union his claimed recognition. E.g., Freeman G. Gaffney, 205 NLRB 1012, (1973), enf'd 506 F.2d 1052 (3d Cir. 1974) (employer assistance and coercion invalidated voluntary recognition); Florida Automatic Sprinkler Contractors, Inc., 199 NLRB 1151, 1158 (1972) (supervisory participation in obtaining authorization cards); Clement Bros., 165 NLRB 698, 699 (1967), enf'd 407 F.2d 1027 (5th Cir. 1969)(employer and union coercion); Bear Creek Construction Co., 135 NLRB 1285, 1286 n.4 (1962)(same). Pacific Erectors, Inc., 256 NLRB 421, 424-25 (1981), enf'd 718 F.2d 1459 (9th Cir. 1983) (prior valid recognition of other union); Edwards & Webb Construction Co., 207 NLRB 614, 619 n.22 (1973)(same). Komatz Construction Inc., 191 NLRB 846, 850-51 (1971), enf'd in part 458 F.2d 317 (8th Cir. 1972)(recognition in the face of rival union's claim of recognition); Couch Electric Co., 143 NLRB 662, 669 (1963)(same).

The Fourth Circuit's decision here notwithstanding, the law in this regard is straight forward and, deeply rooted in the Act. First, as we have noted, voluntary employer recognition of a union as an NLRA §9(a) majority bargaining representative is as valid in the construction industry as in any other industry and such a valid construction industry recognition agreement has the same force and effect and establishes the same continuing rights and obligations as such an agreement in any other industry. See pp. 20-21, supra.

Second, the test of the validity of such an employer recognition agreement is *not* whether the union's proffered evidence of majority employee support is adequate on its face but rather whether the union -- as it claimed and as the employer concluded -- was, *in fact,* the chosen representative of a majority of the employees in an appropriate bargaining unit. Garment Workers, supra, 366 U.S. 737-39. Indeed, no contemporaneous evidentiary proffer of majority union support among unit employees is required. As the First Circuit recently observed, in a construction industry voluntary recognition case cited by the Fourth Circuit here, the union's demand for and "the employer's grant of recognition must be predicated on at least an unchallenged claim, if not actual showing, of *contemporaneous* majority support." NLRB v. Goodless Elec. Co., Inc., supra, 124 F. 3d at 329 (emphasis in original, footnote omitted.)[14]

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[14]It is axiomatic that the union is *not* required to have affirmatively *demonstrated* its majority to the employer at the time of recognition provided, of course, that the union *in fact* represented a majority of unit employees at the time,. E.g., Royal Coach Lines v. NLRB, 838 F.2d 47, 50-51 (2d Cir. 1988); Carmichael Construction Co., 258 NLRB 226, n.1 (1981) enf'd 728 F.2d 1137 (8th Cir. 1984); NLRB v.

Both of these well-settled legal rules rest on the firmest statutory base and nothing in the Fourth Circuit decision provides even a suggestion of any reason for departing from either one. Rather, what the decision below does, we submit, is to adopt a codicil to these rules to the effect that in a construction industry case a voluntary recognition agreement is invalid *per se* if the union's proffer of majority support is that the unit employees are union members and that proffer is made against the background of an extant union security agreement. That codicil to the voluntary recognition agreement law is wrong in two basic regards.

As general matter, a showing that a majority of unit employees are union members is a sufficient showing to support a voluntary employee recognition agreement. E.g., Florsheim Shoe Store Co. v. NLRB, 565 F.2d 1240, 1245 (2d Cir. 1977) ("Joining a union normally implies an authorization to the union to act as bargaining agent..."); Lowery Trucking Co., 177 NLRB 13, 20-21 (1969), enf'd sub nom. Ace-Alkire Freight Lines v. NLRB, 431 F.2d 280 (8th Cir. 1970); Raley's, Inc. 227 NLRB 670 n.1 (1976), enf'd sub nom. NLRB v. Retail Clerks Local 588, 587 F.2d 984 (9th Cir. 1978).

And, contrary to the Fourth Circuit decision, the existence of a background union security clause is *not* a basis for invalidating a union showing of interest based on the bargaining unit employee union membership. In the real world of affairs, voluntary majority union membership among bargaining unit employees comes first and a union security agreement comes second, not the other way around. Strong

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E.L. Rice & Co., 524 F.2d 1148, 1149 (6th Cir. 1975); Van Kleek & Co., Inc., 88 NLRB 785 n.6 (1950), enf'd 189 F.2d 516 (2d Cir 1951).

unions with strong employee support -- and only such unions -- are able to secure union security agreements. Employers -- particularly employers with strong anti-union proclivities like American Automatic -- do not give such agreements away for free as a sign of their benevolence.

Thus the Fourth Circuit's airy assumption -- without any basis in any record fact -- that the extant union security agreement, standing alone, demonstrates that the covered employees are "involuntary" union members could not be more wrong. As this Court said in invalidating an NLRB rule that a union hiring hall provision coerces all the employees who use the hiring hall into involuntary union membership:

> [T]here is no evidence that any of [the Unions] coerced a single employee to join the union ranks or to remain as members. All of the employees affected by the present order were union members when employed on the job in question. So far as we know, they may have been members for years on end. No evidence was offered to show that even a single person joined the union with the view of obtaining work on this project. Nor was there any evidence that any who had voluntarily joined the union was kept from resigning for fear of retaliatory measures against him. [Local 60 Carpenters v. Labor Board, 365 U.S. 651, 655 (1961).]

What we have said is more than sufficient to demonstrate the Fourth Circuit's error. But there is more. The Fourth Circuit proceeded as if the question of whether the voluntary recognition agreement here rested on a proper

showing of majority employee support was litigated before the Board; that the entire record consisted of a contemporaneous membership list and an extant union security agreement; and that, on this record, the panel concluded that the evidence of the Union's majority status was legally inadequate.

But, of course, none of this is true. Before the Board, American Automatic did *not* challenge in any way Local 669's claim of majority support insofar as that claim rested on the bargaining unit employees' union membership. Accordingly, the Union did not put in any evidence as to the voluntary nature of that membership. Indeed, except for the formal papers -- the Union demand for recognition and the employer voluntary recognition agreement -- the record in this case is bare in this regard precisely because the issue was never litigated. The Fourth Circuit's ruling in this regard is not based on record evidence but on non-record evidence and surmise.

How this case was litigated at the Board, moreover, goes to its essence. If put to the test, Local 669 with the greatest assurance could have made its proof that the union memberships here were purely voluntary and strongly held, and that those memberships accurately reflected the members' designation of the Union as their chosen exclusive collective bargaining representative.

Given all this it was the plainest error for the Fourth Circuit to have addressed, much less to have accepted, the Employer's belated, nonrecord based, challenge to the Union's showing of majority support as providing an inadequate evidentiary basis for the 1987 recognition agreement. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142

(1973). Thus "[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court can not evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Florida Power & Light Co., v. Lorion, 470 U.S. 729, 744 (1985).

It is most assuredly *not* the proper course in a case like this for a Court of Appeals to decide an issue not raised or litigated before the NLRB and to do so in a few snippets of non-record "fact" tendered by a party who failed to raise the issue before the administrative agency.

Both as a matter of commission and of omission, then, the Fourth Circuit's invalidation of the 1987 recognition agreement here -- and that court's grant to American Automatic's of a right to bargain in bad faith in 1994 with a union that most assuredly had the strongest majority support -- could not have been more wrong or more contrary to the Act's collective bargain purposes.

CONCLUSION

This petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted

WILLIAM W. OSBORNE, JR.
(Counsel of Record)
MARGUERITE GRAF
One Thomas Circle, N.W.
Suite 1150
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036